years, five of which involved dishonesty — and all of which he admitted. When imposing the sentence the learned Magistrate no doubt had in mind section 29(5) of the Ordinance. That subsection provides:—

"29. (5). Any person who —

(a) having been convicted of an offence punishable under this section or under Chapter XII or Chapter XVII of the Penal Code; .....

is subsequently convicted of an offence punishable under this section shall be liable to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding two years or to both such fine and imprisonment."

The case was referred to me by the learned Deputy Public Prosecutor for the purpose of regularising the conviction and sentence. It is clear that the offender should have been charged under section 29(5) and not section 29(1) of the Ordinance. I am informed that the offender has now served his sentence, subject to the period of remission he has earned, and was, in fact, discharged from prison on the 20th January, 1958. He may, indeed, consider himself extremely fortunate that he was not sentenced to a longer period of imprisonment.

The practical question does arise, however, as to what is the proper subsection under which an offender with previous convictions should be charged for an offence allegedly committed under this section. If he is charged with an offence rendered punishable under section 29(5), of necessity, it brings to the notice of the Magistrate the fact that he is a person with one or more previous convictions. This would seem clearly undesirable if the offender claims trial to the charge. On the other hand, if he is charged with the offence alleged in section 29(1) and thereby rendered liable, upon conviction, to the penalty set out in that section, upon his plea of guilty to the charge preferred under that subsection, can the subsection be properly altered after his plea of guilty so as to render him liable to the enhanced penalty under section 29(5)? It may reasonably be argued, at least as a theoretical proposition, that an offender with one or more previous convictions might well be prepared to plead guilty to the charge as preferred against him for an offence punishable in the manner provided under section 29(1), yet would be most reluctant to plead guilty to that same offence, if it was brought on a charge rendered punishable under section 29(5), thereby rendering him liable to the enhanced penalties provided for by that subsection.

I would venture to suggest that the proper course where a charge is preferred against a person for an offence under section 29(1), who is known to have previous convictions, is that contemporaneously with the charge a notice is served upon him in words approximate to the following effect:—

"Take Notice that at your trial on the charge annexed hereto under section 29(1) of the Minor Offences Ordinance you are liable, upon conviction, to the enhanced penalties provided by section 29(5) of the said Ordinance by reason of the fact that you have been previously convicted of an offence (a) punishable under this section (or Chapter XII or Chapter XVII of the Penal Code). *

(* state whichever applicable)."

The advantages of such a notice is that on the one hand it gives full warning to the offender of the additional penalty to which he is liable upon conviction by reason of his previous conviction or convictions, whilst on the other hand, it conceals from the Magistrate, in the event of a plea of not guilty, the fact of any such previous conviction; which would, of course, not have been the case, if the charge had stated that it was laid under section 29(5) of the Minor Offences Ordinance.

I direct that the conviction as recorded against the prisoner under section 29(1) be expunged from all Police and Prison records and a conviction under section 29(5) be substituted therefor.

Order accordingly.

ARUMUGAM s/o SEENIVASAGAM v. SINNAMAH (f)

[O.C.J. (Hepworth J.) February 26, 1959]

[J.B. — Originating Summons No. 24 of 1958]

Guardianship of Infant — Interference with parental rights — Grounds for — Common law and equity — Civil Law Ordinance, 1956, s.3(1) & (2).

The applicant in this case was the father of a female infant who was born some time in 1942, her mother dying shortly afterwards from complications consequent on the birth. The respondent, who was present and assisted at the birth at the request of the infant's mother, agreed a few days later at the applicant's request to look after the baby and the applicant thereupon handed her over to the respondent together with her birth certificate. Ever since then the infant has been living with and has been looked after by the respondent. On a Summons issued in which the applicant asked for an order that the respondent do surrender the infant to his custody,

Held: by acquiescing in the respondent having the guardianship and the custody of the child for the last 16 years and contributing little or nothing towards her maintenance, the applicant, although he could not be said to have been guilty of any active misconduct, had placed himself in such a position that it would not only be better for the child but essential for its welfare for the child to remain in the custody of the respondent.

The Queen v. Gyngall (1) applied.

At Common Law the parent has, as against other persons generally, an absolute right to the custody of the child, unless he or she has forfeited it by certain sort of misconduct or the right of the parent has been otherwise affected by some specific statutory provision.

In equity the dominant matter for the consideration of the Court is the welfare of the child, although a parent has a right but not an absolute right to the custody of the child and the Court will be very cautious in regard to the circumstances in which they will interfere with the parental right. The Court has to consider the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, the religion of the child, and the happiness of the child.

Cases referred to:—

(1) *The Queen v. Gyngall,* (1893) 2 Q.B. 232.
(2) *In re Spence,* 2 Ph. 247.
(3) *In re Fynn,* 2 De G. & S. 457.
(4) *In re McGrath,* (1893) 1 Ch. 143.

GUARDIANSHIP OF INFANT.

R. Murugason for the applicant.

C. Paramjothy for the respondent.

Cur. Adv. Vult.

Hepworth J.: This is an Originating Summons issued under the Civil Procedure Code in which the applicant asks for an order that the respondent do surrender one Ponnachi (f) to his custody.

The applicant is the father of the said Ponnachi (f), who was born on or about the 15th May, 1942, her mother dying shortly afterwards from complications consequent on the birth. The respondent, who was present and assisted at the birth at the request of Ponnachi's mother, agreed a few days later at the applicant's request to look after Ponnachi and the applicant thereupon handed over Ponnachi to the respondent together with her birth certificate. Ever since then Ponnachi has been living with and has been looked after by the respondent. Ponnachi will be 17 years of age on or about the 15th May, 1959.

The point at issue is whether, as between a parent and a stranger, a parent is *absolutely entitled* to the custody of a child and, if not, what considerations should weigh in determining the person entitled to the child's custody. The law on the subject in England is very clearly set out in the judgment of Lord Esher, M.R., in *The Queen v. Gyngall.* (1) That was an application by *habeas corpus* but I do not think the manner in which the matter was brought before the Court affects the issue. In that case a female child of about 15 years of age was at a home in Weymouth under the superintendence and assumed guardianship of certain persons there. The mother of the child desired to take her away and the persons who had assumed the guardianship and custody of the child refused to give her up. Thereupon the mother applied for a *habeas corpus* in the Queen's Bench Division. The Divisional Court came to the conclusion that it would be contrary to the child's welfare that she should be delivered to her mother and refused the application. The mother then appealed to the Court of Appeal.

In his judgment in the Court of Appeal, Lord Esher stated:—

"It seems to me that before the Judicature Act there were two distinct heads of law, under either of which there might have been an application in the present case. There was a common law jurisdiction, under which the Courts used to deal with these matters by *habeas corpus.* That jurisdiction was exercised for the purpose of determining as between two or more persons their rights. If one person wrongfully imprisoned or detained another, a motion might be made by any one on behalf of the person so imprisoned or detained for a *habeas corpus* before any judge, whether a common law or equity judge. That was, by any judge who exercised it, the common law jurisdiction to determine the rights between parties. That jurisdiction might be exercised in cases where there was no question of the relation of parent and child, or it might be exercised as between parents and other persons. In such latter cases, where the dispute was with regard to the custody of a child, the question arose whether the party detaining the child had a right to detain it as against the parent. I take it that at common law the parent had, as against other persons generally, an absolute right to the custody of the child, unless he or she had forfeited it by certain sorts of misconduct. Certain statutes have been passed, which did limit to some extent the rights of the parent, though not guilty of misconduct that would have disentitled him or her to the custody of the child at common law. Where the common law jurisdiction was being exercised, unless the right of the parent was affected by some misconduct or some Act of Parliament, the right of the parent as against other persons was absolute. Up to what age a child would be considered a child for this purpose, I need not stop to inquire. Of course, there comes an age at which the Court could not say that the parent's right continued to exist.

"But there was another and an absolutely different and distinguishable jurisdiction, which has been exercised by the Court of Chancery from time immemorial. That was not a jurisdiction to determine rights as be-

tween a parent and a stranger, or as between a parent and a child. It was a paternal jurisdiction, a judicially administrative jurisdiction, in virtue of which the Chancery Court was put to act on behalf of the Crown, as being the guardian of all infants, in the place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent."

Lord Esher went on to discuss the position before and after the Judicature Act explaining that prior to the Act it might have been necessary for the Queen's Bench Judges to stay their hands in order to give time for an application to be made to the Court of Chancery to exercise its authority in the matter, whereas after the Judicature Act the Queen's Bench Judges did not have to do that but could exercise the Chancery jurisdiction themselves.

Because the mother had not been guilty of any misconduct which as between her and other people could have derogated from her right to the custody of the child, the learned Master of the Rolls came to the conclusion that the Divisional Court had not been exercising its Common Law jurisdiction in refusing the mother's application but had rightly assumed to exercise the other and independent jurisdiction, *viz.*, that of the Court of Chancery.

His Lordship then referred to the case of *In re Spence* [2] in which Lord Cottenham, L.C., said:—

"I have no doubt about the jurisdiction. The cases in which this Court interferes on behalf of infants are not confined to those in which there is property. Courts of Law interfere by *habeas* for the protection of the person of *anybody* who is suggested to be improperly detained. The Court interferes for the protection of *infants, qua* infants, by virtue of the prerogative which belongs to the Crown as *parens patriae*, and the exercise of which is delegated to the Great Seal."

Lord Esher then continued in his judgment:—

"How is that jurisdiction to be exercised? The Court is placed in a position by reason of the prerogative of the Crown to act as supreme parent of children, and must exercise that jurisdiction in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child. The natural parent in the particular case may be affectionate, and may be intending to act for the child's good, but may be unwise, and may not be doing what a wise, affectionate, and careful parent would do. The Court may say in such a case that, although they can find no misconduct on the part of the parent, they will not permit that to be done with the child which a wise, affectionate, and careful parent would not do. The Court must, of course, be very cautious in regard to the circumstances under which they will interfere with the parental right."

His Lordship then referred to the case of *In re Fynn* [3] in which Knight Bruce, V.C., said:—

"Before this jurisdiction can be called into action .....it" (i.e. the Court) "must be satisfied, not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shewn himself to be a person of such a description, or is *placed in such a position*, as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost, or suspended — should be superseded or interfered with. If the word 'essential' is too strong an expression, it is not much too strong."

Lord Esher then went on to refer to the case of *In re McGrath* [4] in which Lindley, L.J. said:—

"The duty of the Court is, in our judgment, to leave the child alone, unless the Court is satisfied that it is for the welfare of the child that some other course shall be taken. The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word 'welfare' must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

His Lordship then continued in his judgment:—

"The Court has to consider, therefore, the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, the religion of the child so far as it can be said to have any religion, and the happiness of the child. *Prima facie* it would not be for the welfare of a child to be taken away from its natural parent and given over to other people who have not that natural relation to it. Every wise man would say that, generally speaking, the best place for a child is with its parent. If a child is brought up, as one may say, from its mother's lap in one form of religion, it would not, I should say, be for its happiness and welfare that a stranger should take it away in order to alter its religious views. Again, it cannot be merely because the parent is poor and the person who seeks to have the possession of the child as against the parent is rich, that, without regard to any other consideration, to the natural rights and feelings of the parent, or the feelings and views that have been introduced into the heart and mind of the child, the child ought to be taken away from the parent merely because its pecuniary position will be thereby bettered. No wise man would entertain such suggestions as these

.....

The Court has to consider what is for the welfare of the child and for her happiness, what her prospects are if not interfered with, the fact that in a short time she will be able to choose for herself, and what her position will be if taken by the mother to live with her. This child is not a mere infant; if she were only six or seven years old the case would be very different. Again, it is not a case of attempting to take away a child from its mother; it is a question of whether a child who has been away from her mother for a long period shall be forced to go back to her. If a child is living with its parent it may be a very serious dislocation of an existing tie to remove the child from the custody of the parent. But suppose the case of a child which had been living from

infancy with a grandmother or an aunt, no one would say that, when the child had arrived at the age of fourteen without perhaps ever having seen either of its parents, by force of mere instinct it would necessarily prefer to be with them rather than with the persons with whom it had always lived."

The appeal was dismissed.

Although the reasons for the child in that case being in the custody of someone other than her mother are different from the reasons for the child in this case not being in the custody of her father, I think it would be difficult to find an authority which was more in point with the case we are considering and which more appropriately indicates what the decision in this case should be, provided that the law as expressed by Lord Esher in *The Queen v. Gyngall* [1] is applicable here.

I do not know of, nor has my attention been drawn to, any written law in force in the Federation making any provision which is applicable in the circumstances of this case. The Court must therefore apply the Common Law of England and the Rules of Equity as administered in England by virtue of the provisions of sub-section (1) of section 3 of the Civil Law Ordinance, 1956, and, by virtue of sub-section (2) of that section, in the event of conflict or variance between the Common Law and the Rules of Equity with reference to the same matter, the Rules of Equity shall prevail. Accordingly I think that the law as stated by Lord Esher in the case of *The Queen v. Gyngall* [1] is the law applicable here.

To summarise I think that the position in this country is:—

(a) at Common Law that the parent has, as against other persons generally, an absolute right to the custody of the child, unless he or she has forfeited it by certain sorts of misconduct or the right of the parent has been otherwise affected by some specific statutory provision;

(b) in equity that the dominant matter for the consideration of the Court is the welfare of the child, although a parent has a right but not an absolute right to the custody of the child and the Court will be very cautious in regard to the circumstances in which they will interfere with the parental right. The Court has to consider the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, the religion of the child, and the happiness of the child.

That being the case it seems to me that by acquiescing in the respondent having the guardianship and the custody of the child for the last 16 years and contributing little or nothing towards her maintenance, the applicant, although he cannot be said to have been guilty of any active misconduct, has placed himself in such a position that it would not only be better for the child but essential for its welfare for the child to remain in the custody of the respondent. I think that all the considerations which weighed with Lord Esher in the case of *The Queen v. Gyngall* are present in this case and should be considered in the same light.

I should add that, quite apart from the above considerations, I am satisfied that the above conclusion is correct because I spoke to Ponnachi in Chambers at the request of Counsel for both parties, but in their absence, and she stated unequivocally that she wished to remain with the respondent and did not wish to have anything whatever to do with the applicant.

The application is accordingly dismissed with costs.

Application dismissed.

Solicitors: *Murugason & Co.; Wong, Paramjothy & Goh.*

PENANG MOTORS (1950) LTD. v. SUAH MOTORS

[O.C.J. (Rigby J.) April 8, 1957]

[Penang — Civil Suit No. 105 of 1955]

Landlord and Tenant — Rent — Demand — Arrears of rent — Duty of landlord to make demand for rent on premises — Time from which arrears run.

Where there is an agreement to pay rent monthly, there is a duty upon the tenant to pay the rent when it is lawfully demanded on the premises. But there can be no default in payment unless and until that demand has been made. Therefore a tenant can only be said to be in arrears as from the date the lawful demand for payment is made and the 14 days' period for the purposes of the Control of Rent Ordinance can only be said to run as from that date.

In this case the plaintiffs sought to eject their tenants the defendants, on the ground that the tenancy had been terminated by a Notice to Quit dated August 17, 1954, on September 30, 1954, and that on August 16, 1954, although a demand for rent was made on the premises, the defendants were more than 14 days in arrear with their rent. The defendants admitted that their tenancy had been terminated as at September 30, 1954, but denied that they had been at any time in arrears with their rent; they therefore claimed to be protected by the Control of Rent Ordinance, 1948.

Held: even if in this case the rent was payable in advance and therefore lawfully due on August 1, 1954, having regard to the fact that lawful demand for payment was admittedly only made on the premises on August 16, 1954 (it was in fact paid on August 17), therefore the defendants, for the purposes of the Ordinance, was not 14 days in arrears at the date of the service of the Notice to Quit, i.e. August 17, 1954.